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NO. 84-792

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH POERING

Petitioner

v.

LAWRENCE STRATTON, WALTER WARZESKI, RAYMOND LUCAS, and KUTZTOWN STATE COLLEGE, FORREST G. SCHAEFFER, JR., JACOB SAYSHEN, ALBERT KROMMES, MIDLRED S. CORRIGAN RENEE L. DIETRICH, ADE-ROLPH FLOREEN, FREDERICK J. GIORGI, HERMAN S. PLAVNER, MARY GRACE REILLY, ROBERT C. WILBURN, JAMES MULLEN, FREDERICK J. RICCIUS and DIANE PHIPPS

Respondents

On Petition For Writ of Certiorari
to The United States Court of Appeals
For the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD THE SUPREME COURT REVIEW THE DECISION OF THE COURT BELOW WHEN REVIEW WOULD INVOLVE ONLY QUESTIONS OF FACT DECIDED UNDER WELL-ESTABLISHED PRINCIPLES AND WHEN THE DECISION OF SUCH QUESTIONS IS OF INTEREST ONLY TO THE PARTIES IN THIS CASE.

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Respondents respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

In this action filed pursuant to 42 U.S.C. § 1983, the district court granted summary judgment for respondents, officers and trustees of Kutztown State University, on petitioner's claim that denial of his request for tenure violated the First and Fourteenth Amendments. The Court of Appeals affirmed without opinion.

The undisputed material facts of record show that the petitioner was hired by Kutztown State College in January 1978. During petitioner's employment, Kutztown and its faculty were parties to a collective bargaining agreement. This agreement, in part, provided that new members of the faculty would serve a three year probationary term of employment during which they would be evaluated for tenure. After three years, a faculty

member either would be granted tenure or would be terminated. (C.A. App. 21a - 23a).[1]

As a new member of the faculty, petitioner was evaluated for tenure. The chairman of petitioner's department, his department's tenure committee, and fifteen of the seventeen members of his department recommended that he be denied tenure. (C.A. App. 31a - 42a).

Petitioner's tenure application was then considered by a college-wide tenure committee. After reviewing the departmental recommendations and hearing the testimony of petitioner and other faculty members, this committee unanimously recommended that petitioner be denied tenure. (C.A. App. 44a-47a). Petitioner then requested a formal hearing.

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[1]"C.A. App." refers to the appendix filed in the Court of Appeals.

Pursuant to the collective bargaining agreement, there was assembled a hearing committee composed of three members of the faculty and a legal advisor from outside the college community. The committee was selected as follows:

1. Eleven names from the entire faculty of the college, other than faculty from petitioner's department were chosen at random. From this list of eleven, the college and petitioner could each peremptorily strike four names. The parties then had an unlimited number of challenges for cause.

2. The committee's legal advisor was chosen from a list of attorneys or arbitrators prepared jointly by the college and petitioner's union. The legal advisor chosen was agreed upon by petitioner and the college. (C.A. App. 55a-62a).

The hearing committee selected by petitioner and the college held a hearing lasting three full days. The hearing was comparable to a court trial and was conducted in accordance with formal procedures, including pre-hearing discovery, counsel representation, testimony of witnesses under oath and subject to cross-examination, an unlimited right to offer relevant evidence, stenographic recording of the proceedings, legal arguments and briefs, a written decision of the committee containing findings and conclusions based upon the credible evidence of record. (C.A. App. 55a-62a).

After the hearing record was transcribed and briefs were submitted by counsel for the parties, the hearing committee issued a written decision and unanimously concluded that just cause existed to deny tenure. Among the numerous specific findings made by the

committee were that petitioner had assaulted a fellow faculty member, appeared on campus reeking of marijuana, accused another faculty member of stealing his marijuana, failed to prepare manuals and other materials required for his courses, and combined two separate courses into one thereby doing half the work that he had been assigned. The committee made numerous other findings detailing petitioner's unsatisfactory professional conduct. (C.A. App. 64a - 68a).

Petitioner appealed the decision denying him tenure to the Pennsylvania Secretary of Education. On November 11, 1981, the Secretary "[a]after careful consideration of the records including the transcripts of the hearing, the briefs filed by the respective attorneys, the decision of the Due Process Committee and [Petitioner's] letter of September

10, 1981," determined that substantial evidence existed for the decision to deny tenure. (C.A. 72a).

None of the members of the committees that recommended denial of tenure is a defendant in this case. It is also undisputed that the defendants in this case had no communications with the hearing committee members regarding petitioner's tenure (C.A. App. 174a - 175a; 210a -211a; 238a - 239a). In addition, the hearing committee members who found sufficient cause to deny petitioner tenure filed unrebutted affidavits in the district court averring that they based their decision solely on the credible evidence disclosed during the hearing.

The record below also contains the more than seven hundred page transcript of petitioner's tenure hearing,

including petitioner's lengthy testimony. The transcript reveals no evidence that petitioner's alleged free speech played a role in the tenure decision.

The district court granted respondents' motion for summary judgment. (Pet. 39). The court found, after examining the affidavits and other materials submitted by respondents, that petitioner failed adequately to controvert the respondents' position that his denial of tenure was based on merit and the procedures afforded to petitioner were sufficient to satisfy due process. The court of appeals affirmed. (Pet 40-41).

ARGUMENT

Petitioner seeks to have this Court review a decision of the Third Circuit Court of Appeals upholding the entry of summary judgment for the respondents. The questions presented by the petition for a writ of certiorari are limited to the particular facts of record in this case and are of interest only to the parties to it. Petitioner states "no special or important" reasons for review and indeed no such reasons exist in this case.

The petition for certiorari is nothing more than a request to have this Court undertake a third review of an extensive factual record to determine whether the district court correctly decided that the record showed the absence of genuine disputes of material fact requiring the entry of summary

judgment. This Court has ruled frequently that factual reviews are not appropriate tasks for this Court. National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498, 503 (1951); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178-179 (1938); United States v. Johnston, 268 U.S. 220, 227 (1925).

The questions raised by the petition turn entirely on the facts of record in this particular case. Such questions have already been resolved twice in favor of respondents and are without impact or significance outside the limits of this particular case.[2]

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[2]Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1922) (certiorari appropriate only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties ....").

The petition for a writ of certiorari should be denied.

1. In his complaint and two amended complaints, petitioner alleged that he was denied tenure because he expressed his view that the criminal justice program at Kutztown State College should be a separate department. After this Court's decision in Connick v. Myers, No. 81-1251 (April 20, 1983), seemed to defeat this claim, petitioner for the first time sought to allege that he was denied tenure because he talked to his students and fellow faculty members about controversial issues.

In moving for summary judgment, defendants submitted overwhelming evidence showing that petitioner was denied tenure for reasons having absolutely nothing to do with his alleged free speech activities and that the decision to deny tenure was made

largely by persons other than the named defendants. For his part, petitioner offered nothing but conclusory statements setting forth his views and beliefs regarding why he was denied tenure. As a result, the entry of summary judgment was entirely correct and consistent with the applicable decisions of this court. See Connick v. Myers, No. 81-1251 (April 20, 1983); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 273 (1977).

2. The petitioner's Fourteenth Amendment procedural due process claim was based on the alleged lack of impartiality of the hearing committee that found cause for the denial of tenure. Petitioner's claim was totally refuted by the undisputed facts of record. These facts included unrebutted affidavits by the members of the hearing committee averring that they based their

decision on the credible evidence of record, and the unrebutted testimony of respondents that they had no communications with the members of the hearing committee regarding petitioner's tenure (see 174-172a; 210a, 211a; 238a-239a). Also, under the relevant procedures, petitioner had an unlimited right to challenge the members of the hearing committee for bias or other just cause and yet he did not do so until the matter was completed and decided adversely to him. Petitioner submitted nothing to support his conclusory claim of lack of impartiality. As a result, the Court's decision granting summary judgment for defendants was entirely correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

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